IN THE

Supreme Court of the United States

October Term, 1967

No. 695

CHARLES C. GREEN, *et al.*,

Petitioners,

—v.—

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 12, 1967.

Citations to Opinions Below

The District Court filed memorandum opinions on May 17, 1966 and on June 28, 1966. Both are unreported but are reprinted in the appendix at pp. 1-15a. The June 12, 1967 opinion of the Court of Appeals, reprinted in the appendix at p. 16a, is reported at —— F.2d ——.

Jurisdiction

The judgment of the Court of Appeals was entered June 12, 1967, appendix p. 41a, *infra*. Mr. Justice Black, on September 8, 1967, extended the time for filing the petition for certiorari until October 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether—13 years after *Brown* v. *Board of Education*—a school board adequately discharges its obligation to effect a unitary non-racial school system, by adopting a freedom of choice desegregation plan, where the evidence shows that such plan is not likely to disestablish the dual system and where there are other methods, no more difficult to administer, which would immediately produce substantial desegregation.

Statutes and Constitutional Provisions Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Petitioners seek review of the adequacy of a freedom of choice desegregation plan adopted by defendant School Board and approved by the Court below *en banc*, Judges Sobeloff and Winter disagreeing with the majority opinion.

I. *The Pleadings and Evidence*

Petitioners, Negro parents and children of New Kent County, Virginia, filed on March 15, 1965, in the United States District Court for the Eastern District of Virginia, a class action seeking injunctive relief against the maintenance of separate schools for the races. The complaint named as defendants the County School Board, its individual members, and the Superintendent of Schools.[1]

To comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 241, and regulations of the United States Department of Health, Education and Welfare, the New Kent County School Board, on August 2, 1965, adopted a freedom of choice desegregation plan and on May 10, 1966 filed copies thereof with the District Court.

New Kent is a rural county in Eastern Virginia, east of the City of Richmond. There is no residential segregation; both races are diffused generally throughout the

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[1] The action was filed pursuant to 28 U.S.C. § 1331 and § 1343, and 42 U.S.C. § 1981 and § 1983. The complaint alleged that (R. Vol. 2, p. 8):

> Notwithstanding the holding and admonitions in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), the defendant school board maintains and operates a biracial school system. . . .
>
> [that the defendants] ha[d] not devoted efforts toward initiating non-segregation in the public school system, [and had failed to make] a reasonable start to effectuate a transition to a racially non-discriminatory school system as under paramount law it [was] their duty to do.

The defendants filed, on April 5, 1965, a Motion to Dismiss the complaint on the sole ground that it failed to state a claim upon which relief could be granted (R. Vol. 2, p. 13). In an order entered on May 5, 1965, the district court deferred ruling on the motion and directed the defendants to file an answer by June 1, 1965 (R. Vol. 2, p. 15).

county.[2] (cf. PX "A" and "B"; see also the opinion of Judge Sobeloff at p. 23a.)[3]

Students:[4] During the 1964-1965 school year some 1291 students (approximately 739 Negroes, 552 whites) were enrolled in the only two schools maintained by the county: New Kent School, a combined all-white elementary and high school and George W. Watkins School, a combined all-Negro elementary and high school. There were no attendance zones. Each school served the entire county. During 1964-65, 11 Negro busses canvassed the entire county to deliver 710 of the 740 Negro pupils to Watkins, located in the western half of the county. Ten busses transported almost all of the 550 white pupils to New Kent in the eastern half. (See PX "A" and "B" and the answer to question No. 4).

There was no pupil desegregation whatever during the 1964-65 school year. Every Negro pupil attended Watkins and every white pupil attended New Kent. Eighteen Indian pupils living in New Kent were bussed to the Indian school in adjoining Charles City County.

From 1956 through the 1965-66 school year school assignments of New Kent pupils were governed by the Virginia Pupil Placement Act §22.232.1 *et seq.* Code of Vir-

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[2] The Census reports show that the Negro population was substantially the same in each of the four magisterial districts in New Kent County: Black Creek-479, Cumberland-637, St. Peters-633, and Weir Creek-565. See U.S. Bureau of the Census. *U.S. Census of Population:* 1960 *General Population Characteristics, Virginia.* Final Report PC(1)-48B.

[3] The prefix "PX" refers to plaintiffs' exhibits. Exhibits "A" and "B" show the bus routes for each of the two county schools. Each exhibit shows the routes travelled by the various busses bringing children to that particular school. Each school is served by busses that traverse all areas of the county.

[4] The information that follows was obtained from defendants' answers to plaintiffs interrogatories (R. Vol. 2, pp. 27-36).

ginia, 1950 (1964 Replacement Volume), repealed by Acts of Assembly, 1966, c. 590, under which any pupil could request assignment to any school in the county; children making no request were assigned to the school previously maintained for their race. The free choice plan the Board adopted in August, 1965 was not placed into effect until the 1966-67 school year by which time it had been approved by the district court.

Up to and including the 1964-65 school year, no Negro pupil ever sought admission to New Kent School and no white pupil ever sought admission to Watkins (R. Vol. 2, p. 28). Thus, at the close of the 1964-65 school year, 11 years after *Brown* v. *Board of Education*, 347 U.S. 483, none of the 739 Negro pupils in the county were in, or had ever attended, school with white students.

As the following table[5] indicates, the Negro school was more overcrowded and had a substantially higher pupil-teacher ratio, and larger class sizes than the white school:

Name of School	*Pupil-Teacher Ratio*	*Average Class Size*	*Overcrowding Variance from Capacity (Elem. Schools)*	*Number Buses*	*Average Pupils Per Bus*
New Kent (white) 1-12	22	21	+ 37 (9%)	10	54.8
George W. Watkins (Negro) 1-12	28	26	+118 (28%)	11	64.5

In the 1965-66 school year some 35 Negroes attended the formerly white New Kent High School but no white students attended Watkins. During the year just ended, 1966-1967, 111 of the 739 Negroes in the County attended New Kent.

[5] This table was compiled from defendants' answers to plaintiffs' interrogatories relative to the 1964-65 school year (R. Vol. 2, pp. 27-36).

No white students attended Watkins; all 628 pupils at Watkins were Negroes. Thus, as late as 13 years after the decision in *Brown*, 85% of the Negro students in the County attended school only with other Negroes.[6]

Faculty: Contracts with teachers are executed for a period of one year. No white teachers were assigned to the all-Negro Watkins School during 1964-65 nor Negro teachers to the all-white New Kent School, and none had ever been so assigned. The policy remained unchanged for 1965-66. During 1966-67 the extent of teacher desegregation was the assignment of a single Negro teacher two days each week to New Kent.

II. *The Plan Adopted by the Board*

As indicated above, the New Kent School Board on August 2, 1965, adopted a freedom of choice desegregation plan to be placed into effect in the 1966-67 school year.[7] The plan provides essentially for "permissive transfers" for 10 of the 12 grades. Only students eligible to enter grades one and eight are required to exercise a choice of schools. It provides further that "any student in grades other than grades one and eight for whom a choice is not obtained will be assigned to the school he is now attending."[8]

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[6] The record in this case, like the records in all school desegregation cases, is necessarily stale by the time it reaches this Court. In this case the 1964-65 school year was the last year for which the record supplied desegregation statistics. Information regarding student and faculty desegregation during the 1965-66 and 1966-67 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. Certified copies thereof and an accompanying affidavit have been filed with this Court and served upon opposing counsel.

[7] The plan was included by the district court in its memorandum opinion of June 28, 1966, reproduced herein at p. 4a.

[8] By failing to require, at least in its initial year, that every student make a choice, the plan permits some students to be assigned under the former dual assignment system until approximately 1973. Under the plan

It states that no choice will be denied other than for overcrowding in which case students living nearest the school chosen will be given preference.

III. *The District Court's Decision*

On May 4, 1966, the case was tried before the District Judge, Hon. John D. Butzner, Jr., who, on May 17, 1966, entered a memorandum opinion and order: (a) denying defendants' motion to dismiss, and (b) deferring approval of the plan pending the filing by the defendants of "an amendment to the plan [which would provide] for employment and assignment of staff on a non-racial basis." (R. Vol. 2, pp. 51-56; 2a).

The Board filed on June 6, 1966, a supplement to its plan dealing with school faculties. On June 10, 1966, plaintiffs filed exceptions to the supplement contending

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students entering other than grades one or eight who do not exercise a choice are assigned to the school they are then attending. Thus, a student, who began school in fall, 1965, one year before the plan went into effect and was therefore assigned to a school previously maintained for his race would, unless he affirmatively exercised a choice to go elsewhere, be reassigned there for the remainder of his elementary school years. Similarly, students who entered high school prior to 1966-67 under the old dual assignment system, would, unless they took affirmative action to transfer elsewhere, be reassigned to that school until graduation. The plan, then, permits some students (those who began at a school before it went into effect) to be reassigned for as long as up to seven years (in the case of a first grader) to schools to which they originally had been assigned on the basis of race. It need hardly be said that such a plan—one which fails immediately to abolish continued racial assignments or reassignments—may not stand under *Brown* v. *Board of Education*, 347 U.S. 483 and 349 U.S. 294. The Fifth Circuit has rejected plans having that effect. See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 890-891, *aff'd with modifications on rehearing en banc*, No. 23345, March 29, 1967, *petition for certiorari pending*, Nos. 256, 282, 301. We point this out only in the interest of careful analysis. For overturning the decision below on this ground would be insufficient to protect petitioners' rights. As we more fully develop later what is objectionable about this plan is its employment of free choice assignment provisions to perpetuate segregation in an area, where, because of the lack of residential segregation, it could not otherwise result.

(a) that the supplement failed to provide sufficiently for faculty and staff desegregation, and (b) that plaintiffs would continue to be denied constitutional rights under the freedom of choice plan and that the defendants should be required to assign students pursuant to geographic attendance areas. (R. Vol. 2, pp. 61-62).

On June 28, 1966, the district court entered a memorandum opinion and an order approving the freedom of choice plans as amended. (R. Vol. 1, pp. 7-19; 4a.)

IV. *The Court of Appeals' Opinion*

On appeal to the Court of Appeals for the Fourth Circuit petitioners contended that in view of the circumstances in the county, the freedom of choice plan adopted by the defendants was the method least likely to accomplish desegregation and that the district court erred in approving it.

On June 12, 1967, the Court, *en banc,* affirmed the district court's approval of the freedom of choice assignment provisions of the plan, but remanded the case for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal objective time table," some of the faculty provisions of the decree entered by the Fifth Circuit in *United States* v. *Jefferson County Board of Education, supra* (22a).

Judges Sobeloff and Winter concurred specially with respect to the remand on the teacher issue but disagreed on other aspects. Said Judge Sobeloff (22a):[9]

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[9] This case was decided together with a companion case *Bowman* v. *County School Board of Charles City County, Virginia,* No. 10793, for which no review is sought. While the opinion discussed herein was rendered in the *Charles City* case, it was expressly made applicable to *New Kent* (p. 15a); similarly Judge Sobeloff stated that his opinion in *Charles City* applied to *New Kent* (p. 22a).

> I think that the District Court should be directed not only to incorporate an objective time table in the School Board's plans but also to set up procedures for periodically evaluating the effectiveness of the Board's "Freedom-of-choice" plans in the elimination of other features of a segregated school system.
>
> . . . Since the Board's "Freedom-of-choice" plan has now been in effect for two years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. (24a)

While they did not hold, as petitioners had urged, that the peculiar conditions in the county made freedom of choice constitutionally unacceptable as a tool for desegregation they recognized that it was utilized to maintain segregation (27-28a):

> As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, *the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning*—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School.
>
> Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, *is deliberately maintaining a*

> *segregated system which would vanish with non-racial geographic zoning.* The conditions in this county represent a classical case for this expedient. (Emphasis added.)

While the majority implied that freedom of choice was acceptable regardless of result, Judges Sobeloff and Winter stated the test thus (30a):

> 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case presents an issue of paramount importance regarding the desegregation of public schools throughout the southern and border states pursuant to *Brown* v. *Board of Education.*[10] More particularly, the question is whether in the mid-sixties, a full generation of public school children after *Brown,* school boards may continue to adopt so-called freedom of choice desegregation plans which tend to perpetuate racially identifiable schools, where there are other methods, equally if not more feasible to administer, which will more speedily disestablish the dual systems.

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[10] 347 U.S. 483 (*Brown I*); 349 U.S. 294 (*Brown II*).

The most marked and widespread innovation in school administration in the southern and border states in the last fifty years has been the change in pupil assignment method in the years since *Brown*,[11] from a geographic attendance zone system to so-called "free choice." Prior to *Brown*, systems in the North and South, with rare exception, assigned pupils by means of zone lines drawn around each school.[12]

Under an attendance zone system, unless a transfer request is granted for some special reason, students living in the zone of the school serving their grade would normally attend that school.

Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need to furnish transportation, encourage the use of schools as community centers and generally facilitate the task of planning for an ever-expanding school population.[13]

In states where separate systems were required by law, the zone assignment method was implemented by drawing around each white school attendance zones designed to

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[11] See generally, Campbell, Cunningham and McPhee, *The Organization and Control of American Schools, 1965*. ("As a consequence of [*Brown* v. *Board of Education, supra*], the question of attendance areas has become one of the most significant issues in american education of this Century" (at 136)).

[12] See Meador, *The Constitution and The Assignment of Pupils to Public School*, 45 Va. L. Rev. 517 (1959), "until now the matter has been handled rather routinely almost everywhere by marking off geographical attendance areas for the various buildings. In the South, however, coupled with this method has been the factor of race."

[13] Campbell, Cunningham and McPhee, *supra*, Note 11 at 133-144.

accommodate whites in the area, and around each Negro school attendance zones for Negroes. In many areas, as in the cases before the Court, where the entire county was a zone, lines overlapped because of the lack of residential segregation. Thus, in most southern school districts, school assignment was largely a function of three factors: race, proximity and convenience.

After *Brown*, southern school boards were faced with the problem of "effectuating a transition to a racially nondiscriminatory system" (*Brown II* at 301). The easiest method was to convert the dual attendance zones, drawn according to race, into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin the desegregation process, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated,[14] switched to what has in practice worked the same way—the so-called free choice.[15]

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[14] The Virginia Pupil Placement Law was invalidated in *Green* v. *County School Board of the City of Roanoke*, 304 F.2d 118 (4th Cir., 1962) and *Marsh* v. *County School Board of Roanoke County, Va.*, 305 F.2d 94 (4th Cir., 1962). For other cases invalidating or disapproving similar laws, see *Northcross* v. *Board of Education of the City of Memphis*, 302 F.2d 818 (6th Cir., 1962); *Gibson* v. *Board of Public Instruction of Dade County*, 272 F.2d 763 (5th Cir., 1959); *Manning* v. *Board of Public Instruction of Hillsboro County*, 277 F.2d 370 (5th Cir., 1960); *Dove* v. *Parham*, 282 F.2d 256 (8th Cir., 1960).

[15] According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School Desegregation, 1966-67*, A Report of the U.S. Commission on Civil Rights, July, 1967. The Report states, at pp. 71-72:

> All . . . districts [desegregating under voluntary plans] in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

Under a so-called free choice plan of desegregation, students are given a privilege rarely enjoyed in the past —the opportunity to attend the school of their choice. Most often they are permitted to choose any school in the system, but in some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms now have to be processed and standards developed for passing on them, with provision for notice of the right to choose and for dealing with students who fail to exercise a choice),[16] they are, in addition, far less likely to disestablish the

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The great majority of districts under court order also are employing "freedom of choice."

See also *Survey of School Desegregation in the Southern and Border States, 1965-1966,* United States Commission on Civil Rights, February, 1966, at p. 47.

[16] The decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, *aff'd with modification on rehearing en banc,* Civil No. 23345, March 29, 1967, shows the complexity of such plans. That Court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton* v. *Jackson Municipal Separate School District,* 355 F.2d 865, 871 (5th Cir. 1966).

Under such plans generally, and under the plan in this case, school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, noitfy students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate mis-performance or non-performance. The Civil Rights Commission has reported on non-compliance by school authorities with their desegregation plans:

> In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had

dual system. And, as demonstrated below, experience has proved them largely incapable of disestablishing the dual system.

Under free choice plans, the extent of actual desegregation varies directly with the number of students seeking, and actually being permitted to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and the hard fact that in far too many areas Negro schools were vastly inferior to those furnished whites[17]—would not seek trans-

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distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a non-racial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

> A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. *School Board of the City of Richmond*, 345 F.2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

[17] Watkins, the Negro school in New Kent County was more overcrowded and had substantially larger class sizes and teacher-pupil ratios than did the white school. (See p. 5, *supra*).

The Negro schools in the South compare unfavorably to white schools in other important respects. In *Equality of Educational Opportunity*, a report prepared by the Office of Education of the United States Department of Health Education and Welfare pursuant to the Civil Rights Act of 1964, the Commissioner states, concerning Negro schools in the Metropolitan South (at p. 206):

> The average white attends a secondary school that, compared to the average Negro is more likely to have a gymnasium, a foreign language laboratory with sound equipment, a cafeteria, a physics laboratory, a room used only for typing instruction, an athletic field, a chemistry laboratory, a biology laboratory, at least three movie projectors.

Essentially the same was said of Negro schools in the non-metropolitan South (*Id.* at 210-211). It is not surprising, therefore, quite apart from race, that white students have unanimously refrained from choosing Negro schools.

fers to the formerly Negro schools; and, indeed, very few ever have.[18] Thus, from the very beginning the burden of disestablishing the dual system under free choice plans was thrust squarely upon the Negro children and their parents, despite the admonition of this Court in *Brown II* (349 U.S. 294, 299) that "school authorities had the primary responsibility." That is what happened in this case. Although the majority stated that (17a):

> The burden of extracting individual pupils from discriminatory racial assignment may not be cast upon the pupils and their parents [and that] it is the duty of the school boards to eliminate the discrimination which inheres in such a system [,]

the very plan the court approved did just that. To be sure each pupil was given the unrestricted right to attend any school in the system. But, as previously noticed, desegregation never occurs except by transfers by Negroes to the white schools. Thus, the freedom of choice plan approved below, like all other such plans, placed the burden of achieving a single system upon Negro citizens.[19]

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[18] "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation, 1966-67* at p. 142, *United States* v. *Jefferson County, supra* at 889.

[19] The free choice plan adopted in this case is subject to serious question on the ground that it promotes invidious discrimination. By permitting students to choose a school, instead of assigning them on some rational non-racial basis, the school board allows students to utilize race as a factor in the school selection process. Thus it is that white students, almost invariably, choose the formerly white schools and not the Negro schools. To be sure the Constitution does not prohibit private discrimination. But states may not designedly facilitate the discriminatory conduct of individuals or lend support to that end. See *Reitman* v. *Mulkey,* 18 L. Ed. 831; *Robinson* v. *Florida,* 378 U.S. 153; *Anderson* v. *Martin,* 375 U.S. 399; *Goss* v. *Board of Education,* 373 U.S. 683. Cf. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. Thus in *Anderson,* this Court held that although individual voters are constitutionally free to vote partly or even solely on the basis of race, the State may not designate the race of candidates on the ballot. Such governmental action promotes and facilitates

The fundamental premise of *Brown I* was that segregation in public education had very deep and long term effects upon the Negroes set apart. It was not surprising, therefore, that individuals, reared in that system and schooled in the ways of subservience (by segregation, not only in schools, but in every other conceivable aspect of human existence) when gratuitously asked to "make a choice," chose, by their inaction, that their children should remain in the Negro schools. In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (hereinafter referred to as *Revised Guidelines*), the Department of Health, Education and Welfare states (45 C.F.R. Part 181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the*

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the voters' succumbing to racial prejudice. So too here, giving students in a district formerly segregated by law the right to choose a school facilitates and promotes choices based on race.

It is no answer that some students may not, in fact, use race as a factor in the choice process. In *Anderson*, the statute was not saved because some persons might vote without regard to the race of the candidate. It is the furnishing of the opportunity that is prohibited by the Constitution.

We do not argue that a school board may never permit students to choose schools. And certainly systems using attendance zones would not run afoul of the Constitution by permitting students to transfer for good cause shown. Presumably in such instances a legitimate non-racial reason would have to be supplied.

Nor do we argue that freedom of choice may never be used where race is intended to be a factor. For in a system in which residential segregation is deeply entrenched, the allowance of a choice of schools based on race may be a useful way to achieve desegregation. There, however, the plan is being used to *undo* rather than *perpetuate* segregation as the plan in this case is being used to do. Cf. *Goss, supra* at 688, where this Court stated that "no plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."

> *effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

Beyond that, by making the Negro's exercise of choice the critical factor upon which the conversion depended, school authorities virtually insured its failure. Every community pressure militates against the affirmative choice by Negro parents of white schools. Moreover, intimidation of Negroes, a weapon well-known throughout the south, could equally be employed to deter them from seeking transfers to the white school. At best, school officials must have reasoned, only a few hardy souls would venture from the more comfortable atmosphere of the Negro school, with their all-Negro faculties and staff. Those that "dared," would soon be taught their place.[20]

Nor were they mistaken. The Civil Rights Commission, in its most recent reports on school desegregation in *Brown*-affected states, reports exhaustively of the violence, threats of violence and economic reprisals to which Negroes have been and are subjected to deter them from

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[20] A good example is *Coppedge* v. *Franklin County Board of Education*, C.A. No. 1796 (E.D. No. Car.), decided August 17, 1967. The Court found that there was marked hostility to desegregation in Franklin County, that Negroes had been subjected to violence, intimidation and reprisals, and that each successive year under the freedom of choice plan it had approved earlier had resulted in fewer requests by Negroes for reassignment to formerly all-white schools. Concluding that (slip op. 15):

> Community attitudes and pressures . . . have effectively inhibited the exercise of free choice of schools by Negro pupils and their parents

the Court directed that the defendants

> prepare and submit to the Court, on or before October, 1967, a plan for the assignment, at the earliest practicable date, of all students upon the basis of a unitary system of non-racial geographic attendance zones, or a plan for the consolidation of grades, or schools, or both. (*Id.* at 17.)

placing their children in white schools.[21] That specific episodes do not occur to particular individuals hardly prevents them from learning of them and acting on that knowledge.

With rare exception, then, school officials adopted, and the lower courts condoned, free choice knowing full well that it would produce less Negro students in white schools, and less injury to white sensibilities than under the geo-

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[21] *Southern School Desegregation, 1966-67* at pp. 70-113; *Survey of School Desegregation in the Southern and Border States, 1965-66,* at pp. 55-66. To relate but a few of the numerous instances of intimidation upon which the Commission reported: the 1966-67 study quotes the parents of 12 year old boy in Clay County, Mississippi as saying (at p. 76):

> white folks told some colored to tell us that if the child went [to a white school] he wouldn't come back alive or wouldn't come back like he went.

In Edgecombe County, North Carolina the home of a Negro couple whose son and daughter were attending the formerly all-white school was struck by gunfire (79). In Dooly County, Georgia, the father of a 14 year old boy, who had filled out his own form and attended the formerly white school, reported that "that Monday night the man [owner] came and said 'I want my damn house by Saturday.'" (83)

The Commission made the following findings, in its 1966-67 report, (at p. 142):

> 6. Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and Border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:
>
> (a) Fear of retaliation and hostility from the white community . . .
>
> (b) [V]iolence, threats of violence and economic reprisal by white persons, [and the] harassment of Negro children by white classmates . . .
>
> (c) [improper influence by public officials].
>
> (d) Poverty. . . . Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;
>
> (e) Improvements . . . have been instituted in all-Negro schools . . . in a manner that tends to discourage Negroes from selecting white schools.

graphic attendance zone method. Their expectations were justified. Meaningful desegregation has not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to the Negro schools. In most districts, therefore, as in the case before the Court, the vast majority of Negro pupils continue to attend school only with Negroes.

Although the proportion of Negroes in all-Negro schools has declined since *Brown*, more Negro children are now attending such schools than in 1954.[22] Indeed, during the 1966-67 school year, a full 12 years years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in schools which were 100% Negro.[23] And, in the case before the Court, 85% of the Negro pupils in New Kent County still attend schools with only Negroes. "This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student."[24] Thus, as the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been of such stuff as dreams are made on."[25]

In its most recent report, the Civil Rights Commission states:

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[22] *Southern School Desegregation*, 1966-67, at p. 11.

[23] *Id.* at 165.

[24] *Id.* at 147.

[25] *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d 836 at 845.

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last years commission's survey of southern school desegregation, show that *the freedom of choice plan is inadequate in the great majority of cases as an instrument for disestablishing a dual school system.* Such plans have not resulted in desegregation of Négro schools and therefore perpetuate one-half of the dual school system virtually intact. [Emphasis added][26]

II.

A Freedom of Choice Plan is Constitutionally Unacceptable Where There are Other Methods, no More Difficult to Administer, Which Would More Speedily Disestablish the Dual System.

The duty of a school board under *Brown,* in the mid-sixties (by now, the time for "deliberate speed" has long run out[27]) is to adopt that plan which will most speedily accomplish the effective desegregation of the system. We quite willingly concede that a court should not enforce its will where alternative methods are not likely to produce dissimilar results—that much discretion should still be the province of the school board. We submit, however, that a

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[26] *Southern School Desegregation, 1966-1967,* pp. 152-153. In an earlier report, *Racial Isolation in the Public Schools,* the Civil Rights Commission observed (at p. 69) that, ". . . the degree of school segregation in these free-choice systems remain high." and concluded that (*ibid*): "only limited school desegregation has been achieved under free choice plans in Southern and Border City school systems."

[27] Almost two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of The City of Richmond,* 382 U.S. 103, 105. "There has been entirely too much deliberation and not enough speed . . ." *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 229. Cf. *Watson* v. *Memphis,* 373 U.S. 526, 533.

court may not—at this late date, in the absence of persuasive evidence showing the need for delay—permit the use of any plan other than that which will most speedily and effectively desegregate the system. Put another way, at this point, that method must be mandated which will do the job more quickly and effectively.

A. *The Obligation of a School Board Under Brown v. Board of Education is to Disestablish the Dual School System and to Achieve a Unitary, Non-racial System.*

At bottom, this controversy concerns the precise point at which a school board has fulfilled its obligations under *Brown I and II*. When free choice plans initially were conceived, courts generally adhered—mistakenly, we submit—to the belief that it was sufficient to permit each student an unrestricted free choice of schools. It was said that "desegregation" did not mean "integration" and that the availability of a free choice of schools, unencumbered by violence and other restrictions, was sufficient quite apart from whether any integration actually resulted.[28] Despite

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[28] The doctrine probably had its genesis in the now famous dictum of Judge Parker in *Briggs* v. *Elliot*, 132 F.Supp. 776, 777 (E.D.S.C. 1955) "The Constitution . . . does not require integration. It merely forbids segregation"; See generally *Jeffers* v. *Whitley*, 309 F.2d 621, 629 (4th Cir. 1962); *Borders* v. *Rippy*, 247 F.2d 268, 271 (5th Cir. 1957); *Boson* v. *Rippy*, 285 F.2d 43, 48 (5th Cir. 1960); *Vick* v. *Board of Education of Obion County*, 205 F.Supp. 436 (W.D. Tenn. 1962); *Kelley* v. *Board of Education of the City of Nashville*, 270 F.2d 209, 229 (6th Cir. 1959).

In recent years, several courts in addition to that in *United States* v. *Jefferson County Board of Education, supra* (See discussion *infra* at pp. 23-25), have rejected the dictum in *Briggs*. Even before *Jefferson County*, Judge Wisdom had tersely observed that "Judge Parker's well known dictum. . . . should be laid to rest". *Singleton* v. *Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965). In *Kemp* v. *Beasley*, 352 F.2d 14, 21 (1965), the Eighth Circuit stated that "The dictum in *Briggs* has not been followed or adopted by this Circuit and is logically inconsistent with *Brown*." To the same effect is *Kelley* v. *Altheimer Arkansas Public School District*, 378 F.2d 483, 488 (8th Cir. 1967). See also *Evans* v. *Ennis*, 281 F.2d 385, 389 (3rd Cir. 1960) where

its protestations, the majority below manifested much of this thinking (17-18a, 19a):

> Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, [freedom of choice] is an illusion and an oppression which is constitutionally impermissible . . .
>
> Employed as descriptive of a system in which each pupil or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. * * *
>
> *Since plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.* (Emphasis added.)

At no point in its opinion did the majority meet the essence of petitioners' claim—that in view of related experience under the Pupil Placement laws, there was no good reason to believe that free choice would, in fact, desegregate the system and that the district court should have mandated the use of geographic zones which, on the evidence before it, would produce greater desegregation.

The notion that the making available of an unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students choose white schools, is, we submit, fundamentally inconsistent with the decisions of this Court in *Brown* I and II, *Cooper* v. *Aaron*, 358 U.S. 1; *Bradley* v.

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the court declared "The Supreme Court has unqualifiedly declared integration to be their constitutional right." Cf. *Blocker* v. *Board of Education of Manhasset*, 226 F.Supp. 208, 220, 221 (E.D.N.Y. 1964) and *Board of Education of Oklahoma City Public Schools, et al.* v. *Dowell*, 372 F.2d 158 (10th Cir. 1967).

School Board of the City of Richmond, 382 U.S. 103 and the entire series of school cases it has decided.[29] The Eighth Circuit has said:

> A Board of Education does not satisfy its obligation to desegregate by simply opening the doors of a formerly all-white school to Negroes. [footnote omitted]

Kelley v. *Altheimer Arkansas Public School District*, *supra* at 488. And only recently, the Fifth Circuit, in a major school desegregation decision[30] that necessarily conflicts with the Fourth Circuit's, specifically rejected the argument that *Brown* I and the Constitution do not require integration but only an end to enforced segregation. Concluding that "integration" and "desegregation" mean one and the same thing, the Court used the terms interchangeably to mean the achievement of a "unitary non-racial [school] system". Said the Court (372 F.2d 836, 847 at Note 5):

> Decision-making in this important area of the law cannot be made to turn upon a quibble devised over ten years ago by a court [*Briggs*] that misread *Brown*, misapplied the class action doctrine in the school desegregation cases, and did not foresee the development of the law of equal opportunities.
>
> * * *
>
> We use the terms "integration" and "desegregation" of formerly segregated public schools systems to mean the conversion of a formerly de jure system to a unitary, non-racial (non-discriminatory) system—lock,

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[29] See *Rogers* v. *Paul*, 382 U.S. 198; *Calhoun* v. *Latimer*, 377 U.S. 263; *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218; *Goss* v. *Board of Education*, 373 U.S. 683.

[30] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd with modifications on rehearing en banc.* Civ. No. 23345, March 1967, *petition for certiorari pending*, Nos. 256, 282, 301.

> stock and barrel: students, faculty, staff, facilities, programs and activities.

On rehearing *en banc* the majority put it this way (slip op. at 5):

> [school] Boards and officials administering public schools in this circuit [footnote omitted] have the affirmative duty under the Fourteenth Amendment to bring about an integrated unitary school system in which there are no Negro schools and no white schools —just schools. Expressions in our earlier opinion distinguishing between integration and desegregation [footnote omitted] must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the dual system in this circuit requires integration of faculties, facilities and activities, as well as students.

The Court went on to hold that the test for any school desegregation plan is whether the plan achieves the "substantial integration" which is constitutionally required and that a plan not accomplishing that result must be abandoned and another substituted (372 F.2d 836, 895-896).[31] We sub-

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[31] The Court conceded, as we do here, that the Constitution does not require that "each and every child . . . attend a racially balanced school," nor that school officials achieve "a maximum of racial mixing." (372 F.2d 836, 846). It concluded, however, that school officials in formerly *de jure* systems have "an absolute duty to integrate." (*Ibid.*)

The Department of Health, Education and Welfare has also taken the position that a freedom of choice plan must work—result in actual integration. And under the *Revised Guidelines* the commissioner has the power, where the results under a free choice plan continue to be unsatisfactory, to require, as a precondition to the making available of further federal funds, that the school system adopt a different type of desegregation plan. *Revised Guidelines,* 45 CFR 181.54. Although administrative

scribe to that view and urge its plain and explicit adoption by this Court.

The majority opinion below, in true *Briggs* form, neither states nor implies such a requirement—that the plan "work." The most it can be read to say is that while Negroes rightfully may complain if extraneous circumstances inhibit the making of a "truly free choice," they have no basis to complain and the Constitution is satisfied if no such circumstances are shown. This is not an overharsh reading of the opinion. Only recently a writer observed:

> The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of *Briggs* v. *Elliot*, and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harrassment.[32]

Judge Sobeloff perceived this and exhorted the majority to "move out from under the incubus of the *Briggs* v. *Elliot* dictum and take [a] stand beside the Fifth and Eighth[33] Circuits." (40a)

The Fifth Circuit in Jefferson did not hold, and we do not urge, that freedom of choice plans are unconstitutional *per se*. Indeed, in areas where residential segregation is

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regulations propounded under Title VI of the Civil Rights Act of 1964 are not binding on courts determining private rights under the Fourteenth Amendment, nonetheless they are entitled to great weight in the formulation by the judiciary of constitutional standards. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137, 139-140; *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *United States* v. *Jefferson County, supra, en banc* slip op. at p. 7.

[32] Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42, 72 (1967).

[33] See *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965) discussed in Note 28, *supra*.

substantial and entrenched, a free choice plan might well be the most effective method of desegregation. Rather, our position is that a freedom of choice plan is not an "adequate" desegregation plan (Brown II, *supra*, 349 U.S. at 301), if there is another plan, equally feasible to administer, which will more speedily and effectively disestablish the dual system.

B. *The Record Clearly Showed That a Freedom of Choice Plan Was Not Likely to Disestablish and Has Not Disestablished the Dual School System and That a Geographic Zone Plan Would Immediately Have Produced Substantial Desegregation.*

Plaintiffs' exhibits showed, Judge Sobeloff observed, and the available census figures confirmed, that there was no residential segregation in New Kent County. Separate busses maintained for the races traversed all areas of the county picking up children to be taken to the school maintained for their race. Yet, instead of geographically zoning each school as logic and reason would seem to dictate,[34] and as it most certainly would have done had all children been of the same race, the School Board gratuitously adopted a free choice plan thereby incurring the administrative hardship of processing choice forms and of furnishing transportation to children choosing the school farthest from their homes. Indeed, in view of the lack of residential segregation it can fairly be concluded that the dual school system could not continue, as Judge Sobeloff has said (see p. 9 *supra*), but for free choice. Freedom of choice, then, has been, at least in this community, the means by which the

[34] Compare Judge Sobeloff's suggestion quoted at pp. 9-10, *supra* (27-28a) that the dual system could immediately be eliminated and a unitary non-racial system achieved by the assignment of students in the eastern half of the county to New Kent and those in the western half to Watkins.

State has continued, under the guise of desegregation, to maintain segregated schools.

The Board could not, in good faith, have hoped that enough students would choose the school previously closed to them to produce a truly integrated system. The evidence belies this. The Board had, for several years prior to the adoption of free choice in 1965,[35] operated under the Virginia Pupil Placement Act, under which any student, could, as in free choice, choose any school. When the New Kent Board adopted free choice, no Negro student had ever chosen to transfer to the white school and no white student had ever chosen to attend the Negro school. (R. Vol. 2, p. 28). Thus, at the time the Board adopted free choice, it was fairly clear, based on related experience under the Pupil Placement Law, that free choice would not disestablish the separate systems and produce a "unitary non-racial system."

Nor has it done so in the years since its adoption. During the most recent school year, 1966-67, only 111 of the 739 Negroes in the New Kent School district attended school with whites at the New Kent School. No whites chose to attend and, indeed, none have ever attended, Watkins, the Negro school. A full generation of school children after *Brown*, 85% of New Kent's Negro children still attended a school that was entirely Negro.

Nor did the Board introduce any evidence to justify its method, which, if it could disestablish the dual system at all (and, we think it clear that it could not), would require a much longer period of time than the method petitioners had urged upon the Court. As this Court said in *Brown II* (349 U.S. at 300):

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[35] Although the Board adopted its plan in August, 1965, it was not approved by the Court and actually implemented until the Fall term of 1966.

> The burden rests upon the defendants to establish that such time [in which to effectuate a transition to a racially non-discriminatory system] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

It was, therefore, error for the Court below to approve the freedom of choice plan in the face of petitioner's proof, especially when the Board failed to show administrative reasons, cognizable by *Brown II*, justifying delay.

The data regarding assignment of teachers also reveal the failure of the Board to disestablish the dual system. The racial composition of the faculty at each school during the year just ended (1966-67) mirrored the racial composition of the student bodies. There were no Negroes among the 28 full-time teachers at the formerly all-white New Kent school. Only one Negro teacher was assigned there and that was for the equivalent of two days each week. No white teachers were assigned to the only Negro school, Watkins—all full-time teachers there were Negroes. Thus, neither of the only two schools in the county had lost, either in terms of its students or faculty, its racial identification.[36]

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[36] The failure of the Board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the Board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the non-racial system required by the Constitution. "[F]aculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system". *Clark* v. *Board of Education, Little Rock School District*, 369 F.2d 661, 669-670 (8th Cir. 1966); *United States* v. *Jefferson County Board of Education*, *supra* (at 883-885); *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103; *Rogers* v. *Paul*, 382 U.S. 198.

The duty of the School Board was to convert the dual school system it had created in derogation of petitioners' rights into a "unitary non-racial system." As we have previously noticed it had alternatives—such as utilizing geographic zones or reshaping grade structures—which the record shows would have disestablished the dual system more speedily and with much less administrative hardship than that which it ultimately chose. More importantly, the success of its free choice plan depended on the ability of Negroes to unshackle themselves from the psychological effects of imposed racial discriminations of the past, and to withstand the fear and intimidation of the present and future. Neither of the other methods under which assignment would be involuntary—as it had been until *Brown*—would subject Negroes to the possibility of intimidation or give undue weight, as does free choice, to the very psychological effects of the dual system that this court found objectionable.[37] Instead of employing a procedure which would "as far as possible eliminate the discriminatory effects of the past" (cf. *Louisiana* v. *United States*, 380 U.S. 145) the Board has, by adopting free choice, utilized those discriminatory effects to maintain its essentially segregated system.

But for the relatively small number of Negro children attending the formerly white school, the schools in the county are operated substantially as before the *Brown* decision. "The transfer of a few Negro children to a white school does not", as the Fifth Circuit has observed, "do away with the dual system." *United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 812. All

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[37] In a related context, this Court has said:

> It must be remembered that we are dealing with a body of citizens lacking the habits and traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise. *Lane* v. *Wilson,* 307 U.S. 268, 276.

white pupils in New Kent County still attend the schools formerly maintained for their race; the overwhelming majority of Negroes still attend school only with other Negroes at Watkins. Here, as in most of the other districts utilizing free choice, one-half of the dual system has been retained intact. Nothing but race can explain the continued existence of this all-Negro school and defer indefinitely its elimination, where all races are scattered throughout the county. Freedom of choice has been in this county, the instrument by which the State has used its resources and authority to maintain the momentum of racial segregation.

The statistics demonstrate that freedom of choice has not effected, either in the county before the Court or in most districts in the southern and border states generally, a unitary non-discriminatory system. While its use in the immediate post-*Brown* years might have been justified as an interim or transitional device, one can hardly conceive any justification for its adoption as late as 1966, twelve years after *Brown*. Certainly, the record furnishes no administrative or other reasons for its retention in this county.

In the 13 years since *Brown* I and II, this Court—consistent with its early statement in *Brown II* that "the [district] courts, because of their proximity to local conditions . . . can best perform this judicial appraisal (349 U.S. at 298)"—has rarely reviewed cases challenging desegregation plans (or provisions thereof) approved by the lower courts. But the rule is not without its exceptions and there have been several instances in which this Court has found it necessary to overturn the judgment of a lower court in a school desegregation case.[38]

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[38] The school desegregation cases which the court has reviewed are collected in Note 29, *supra* and accompanying text.

Standing to one side are the school cases, in which the Court acted to preserve, reaffirm, and vindicate, in the face of crude local opposition, the very basis of federal authority. In this category are *Cooper* v. *Aaron*, 358 U. S. 1 and *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218.

The other cases are those in which the Court has reviewed the provisions of a plan; they are few and far between but have a common characteristic: the issue posed is one upon which the continuation of the desegregation process depended. In *Goss* v. *Board of Education*, 373 U.S. 683 (1963), the question concerned the validity of provisions in desegregation plans entitling a student, solely on the basis of race, to obtain a transfer from a school in which he would be in the racial minority, back to his former segregated school where his race would be in the majority. Such provisions were widely being adopted with the approval of the lower courts, even though, as this court found, their effect was to perpetuate segregation. It was absolutely necessary, therefore, to prevent the desegregation process (which had barely begun) from being brought to a resounding halt, that this Court, as it did, hear the case and instruct the lower courts that such provisions were constitutionally unacceptable. So too, in *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 and *Rogers* v. *Paul*, 382 U.S. 198, this Court, faced with increasing litigation concerning teacher desegregation and the unwillingness of lower courts to afford relief, recognized that teacher desegregation was a necessary element of the overall desegregation process and directed that the courts turn their attention to it. We submit that the question in this case is as important to the ultimate successful dismantling of the dual systems in *Brown*—affected states as was the question in *Goss*.

The sheer ubiquitousness of freedom of choice plans,[39] the chorus with which they have uniformly been condemned and their evident failure to disestablish the dual systems a full thirteen years after the *Brown* decision demonstrates that the time has come for this Court to subject their use to careful scrutiny. We repeat, however, that our thrust is limited rather than general; we do not urge that a freedom of choice plan is unconstitutional *per se* and may never be used. Our submission is simply that it may not be used where on the face of the record there is little reason to believe it will be successful and there are other methods, more easily administered, which will more speedily and effectively disestablish the dual system.[40] The constitutionality of the continued use of a free choice plan in that context merits the attention of this Court.

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[39] See Note 15, *supra*.

[40] A trend away from freedom of choice seems to have developed recently in some of the lower courts. And a recent order of a district court in Virginia appears to have adopted the view we urge. See *Corbin* v. *County School Board of Loudon County, Virginia*, C.A. No. 2737, August 27, 1967. In Loudon County, as in this case, Negroes were scattered throughout the County. The district court had approved in May, 1963 a freedom of choice plan of desegregation. In April, 1967, plaintiffs and the United States filed motions for further relief contending that the freedom of choice plan had resulted in only token or minimal desegregation with the majority of Negroes still attending all Negro Schools. They requested that the district be ordered to desegregate by means of unitary geographic attendance zones drawn without regard to race. The district court agreed and on August 27th entered an order directing that:

> No later than the commencement of the 1968-69 school year the Loudon County Elementary Schools shall be operated on the basis of a system of compact, unitary, non-racial geographic attendance zones in which, there shall be no schools staffed or attended solely by Negroes. Upon the completion of the New Broad Run High School, the high schools shall be operated on a like basis.

Cf. Orders requiring the use of geographic zones in *Coppedge* v. *Franklin County Board of Education*, C.A. 1796, decided August 17, 1967, discussed in Note 20, *supra*, and *Braxton* v. *Board of Public Instruction of Duval County, Florida*, No. 4598 (M.D. Fla.), January 24, 1967.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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